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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

SHERMAN HELLER, a married man; LINDA HELLER, a married woman, Plaintiffs/Appellants, v. JAY HUMPHRIES, a married man; KRISTEN HUMPHRIES, a married woman, the MARITAL COMMUNITY of JAY and KRISTEN HUMPHRIES, husband and wife, Defendants/Appellees.	2 CA-CV 2011-0091 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. CV200804202

Honorable Gilberto V. Figueroa, Judge

AFFIRMED

Law Offices of J. Scott Halverson, P.C.
By J. Scott Halverson — Tempe

and

Knapp and Roberts, P.C.
By David L. Abney — Scottsdale
Attorneys for Plaintiffs/Appellants

Holloway Odegard Forrest & Kelly, P.C.
By Sally A. Odegard and Jesse M. Showalter — Phoenix
Attorneys for Defendant/
Appellee Jay Humphries

H O W A R D, Chief Judge.

¶1 Appellants Sherman and Linda Heller appeal from the trial court's grant of summary judgment in favor of appellees, Jay and Kristen Humphries ("Humphries"),[1] on the Hellers' claims arising from the death of their son, Clifford Heller (Clifford). On appeal, the Hellers contend the court erred in granting the Humphries summary judgment because Jay Humphries (Jay) owed a duty of care to Clifford and caused Clifford's injuries. Because we find the court did not err in concluding Jay's actions "did not create 'a foreseeable risk of injury to [Clifford],'" we affirm.

Relevant Facts and Procedural Background

¶2 We view the facts in the light most favorable to the party opposing summary judgment and draw all reasonable inferences arising from the evidence in favor of that party. *Prince v. City of Apache Junction*, 185 Ariz. 43, 45, 912 P.2d 47, 49 (App. 1996). On December 30, 2006, Clifford and Jay were skydiving at a group event. The skydiving facility had imposed a rule that, when skydivers made their final approach to landing, they were not permitted to perform turns greater than ninety degrees. However,

[1]Although Jay Humphries, Kristen Humphries, and the marital community of Jay and Kristen Humphries were named defendants in the complaint and the judgment rendered, only Jay Humphries has appeared in this appeal.

both skydivers made 270-degree turns on their final approaches before they collided in midair. The collision led to Clifford's death.

¶3 The Hellers sued the Humphries for negligence and wrongful death. The Humphries moved for summary judgment, claiming Jay had no duty to Clifford, had not breached a standard of care, and had not caused Clifford's death. The trial court granted the motion and this appeal followed.

Discussion

¶4 The Hellers argue the trial court erred in granting summary judgment in the Humphries' favor because Jay owed Clifford a duty, breached that duty and caused Clifford's death. Summary judgment is proper when the evidence shows that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Ariz. R. Civ. P. 56(c)(1). A court should grant summary judgment "if the facts produced in support of the claim or defense have so little probative value, given the quantum of evidence required, that reasonable people could not agree with the conclusion advanced by the proponent of the claim or defense." *Orme Sch. v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990). We review de novo whether there are any genuine issues of material fact and whether the trial court applied the law properly. *Brookover v. Roberts Enters., Inc.*, 215 Ariz. 52, ¶ 8, 156 P.3d 1157, 1160 (App. 2007).

¶5 "To establish a claim for negligence, a plaintiff must prove the existence of a duty of the defendant to the plaintiff, a breach of that duty, and an injury proximately caused by the breach." *Id.* ¶ 9. An act proximately causes an injury if it is a substantial

factor in bringing about the harm. *Barrett v. Harris*, 207 Ariz. 374, ¶ 26, 86 P.3d 954, 961 (App. 2004). But, in order to hold a defendant liable, "a plaintiff must prove that the plaintiff was in the foreseeable range of the negligent conduct, and that one of the dangers or risks that made the actor's conduct negligent brought about the injury." *Id.* ¶ 28. In *Barrett*, evidence was presented that a doctor's decision to administer "blow-by" oxygen to a newborn baby fell below the standard of care. *Id.* ¶¶ 5-6, 20. However, the risk of the procedure was that it would supply insufficient oxygen while the harm arose when a nurse improperly executed the procedure and too much oxygen was supplied. *Id.* ¶¶ 29-31. Thus, the "risks that made the actor's conduct negligent" did not "br[ing] about the injury." *Id.* ¶ 28.

¶6 Here, Jay and three eyewitnesses provided testimony that Clifford was above and behind Jay at the time of impact. Some evidence indicates that Jay had made an "illegal" 270-degree turn upon his final approach, which immediately preceded the collision. The Hellers have provided two reasons for the prohibition on turns greater than ninety degrees. First, such turns "prevent skydivers from viewing the landing area during the course of their final turns." Second, turns greater than ninety degrees "drastically increase a skydiver's rate of descent."

¶7 Assuming, arguendo, that Jay's turn constituted a breach of the duty of care, Hellers still have failed to show that the turn was a proximate cause of Clifford's death. Turns exceeding ninety degrees "drastically increase a skydiver's rate of descent." But all admissible evidence suggests that Jay was below Clifford when Clifford collided

with Jay from behind. Thus, Jay's risk of increased rate of descent did not bring about the injury. Similarly, turns exceeding ninety degrees "prevent skydivers from viewing the landing area." But the accident was not caused because Jay missed the landing area or failed to see anything that was within view of the landing area—Clifford was above Jay when they collided. Thus, the risks that made Jay's conduct negligent did not bring about Clifford's death.

¶8 The Hellers, however, attempt to create an issue of fact by relying on an investigative report written after the accident. But when reviewing a trial court's decision to grant summary judgment, we will not consider evidence that is not admissible at trial. *See Portonova v. Wilkinson*, 128 Ariz. 501, 502, 627 P.2d 232, 233 (1981). And, the Hellers do not contest the Humphries' statement that the court found the report and accompanying statements to be inadmissible. Nor do they argue on appeal the court erred by doing so.

¶9 Moreover, a transcript of the summary judgment argument was not included in the record on appeal, although the Hellers did attach what appears to be a copy of the transcript in an appendix to their opening brief. The Hellers bore the "responsibility to include in the record on appeal 'such parts of the proceedings as [they] deem[ed] necessary.'" *In re 6757 S. Burcham Ave.*, 204 Ariz. 401, ¶ 11, 64 P.3d 843, 846-47 (App. 2003), *quoting* Ariz. R. Civ. App. P. 11(b)(1). We will not consider alleged transcripts attached to the parties' briefs. *See id.* "'We may only consider the matters in the record before us. As to matters not in our record, we presume that the

record before the trial court supported its decision.'" *Id.*, *quoting Ashton-Blair v. Merrill*, 187 Ariz. 315, 317, 928 P.2d 1244, 1246 (App. 1996); *see also State ex rel. Dep't of Econ. Sec. v. Burton*, 205 Ariz. 27, ¶ 16, 66 P.3d 70, 73 (App. 2003). Thus, we presume the transcript supports the trial court's ruling.

¶10 The Hellers also rely on eyewitness statements suggesting that Jay was not hit from behind, but that both skydivers "flew their parachutes towards each other." Generally, the facts that a court may consider in granting summary judgment include affidavits and depositions, but "'an unsworn and unproven assertion in a memorandum is not such a fact.'" *In re 1996 Nissan Sentra*, 201 Ariz. 114, ¶ 6, 32 P.3d 39, 42 (App. 2001), *quoting Prairie State Bank v. IRS*, 155 Ariz. 219, 221 n.1A, 745 P.2d 966, 968 n.1A (App. 1987). The eyewitness statements proffered by the Hellers are included only as an appendix to the investigative report. The Hellers did not provide an affidavit or deposition even though the witness's information was available in the investigative report. Additionally, the investigative report was declared inadmissible by the trial court. Thus, we will not consider these statements.

¶11 The Hellers further rely on A.R.S. § 12-2506(B), which states that "the trier of fact shall consider the fault of all persons who contributed" to the injury when apportioning liability. They argue that Jay's 270-degree turn "placed [Jay] vertically, laterally, diagonally, and chronologically in the *exact* spot to allow the collision to occur." But to be at fault a person must still satisfy all of the elements of negligence. *See* § 12-2506(F)(2) ("'Fault' means an actionable breach of legal duty, act or omission

proximately causing or contributing to injury or damages sustained by a person seeking recovery, including negligence in all of its degrees."). And even if the Hellers' assertion showed some sort of causation in fact, it would not show proximate causation. *See Salica v. Tucson Heart Hosp.-Carondelet, L.L.C.*, 224 Ariz. 414, ¶ 13, 231 P.3d 946, 950 (App. 2010). Because we conclude Jay was not the proximate cause of Clifford's death, Jay was not at fault, and no liability need be apportioned to him.

¶12 The Hellers additionally contend that foreseeability of injury is a question of fact. However, they cite to *Robertson v. Sixpence Inns of Am., Inc.*, 163 Ariz. 539, 544, 789 P.2d 1040, 1045 (1990), which held "[w]here reasonable people could differ as to whether an injury was foreseeable, the question of negligence is one of fact left to the jury." Here, no reasonable jury could have found that the foreseeable injuries resulting from Jay's 270-degree turn would include being hit by a skydiver above him. *See Orme Sch.*, 166 Ariz. at 309, 802 P.2d at 1008. The Hellers also assert that other jurisdictions have adopted rules of negligence specifically relating to sporting events. But the Hellers never argued this point to the trial court so we do not consider it on appeal. *See City of Tempe v. Fleming*, 168 Ariz. 454, 456, 815 P.2d 1, 3 (App. 1991) ("arguments not made at the trial court cannot be asserted on appeal").

Conclusion

¶13 For the foregoing reasons, we affirm the judgment of the trial court.

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge